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Supreme Court

of the

UNITED STATES.

October Term, 1902.

Henry H. Beckfinger,
Appellant,

vs.

John W. Foster, W. S. Robertson and A. C. Schnell, Trustees of Townsite Board No. 6, Oklahoma Territory.

No. 175.

BRIEF FOR APPELLANT.

JAMES R. KEATON,
JOHN W. SHARTEL,
FRANK WELLS,
JOHN H. COTTERAL,
C. G. HORNOR,
FOR APPELLANT.

20235

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Henry N. Bockfinger,
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BRIEF FOR APPELLANT.

Statement of Case.

The complaint of appellant, including exhibits "B," "C," "D," "E," and "F" attached thereto, shows the following:

That Mark S. Cohn made Homestead Entry No. One (1) at the Guthrie, O. T., land office for the Northwest Quarter of Section Eight (8) in Township Sixteen (16) North of Range Two (2) West of the Indian Meridian at 12 o'clock noon of April 22nd, 1889; (Printed Record, page 17). That on April 23rd, 1889 James W. Feagins made Homestead Entry No. Seventeen (17) for the Southwest Quarter of same Section, he having made settlement thereon at thirty-five

minutes after 12 o'clock noon the preceding day; (R. pp. 4, 19). That affidavits of contest were filed against Cohn's entry by Thomas J. Taylor, John Eaton, Edmond Slayter and others, alleging, among other things, that said entryman had entered the Territory of Oklahoma before 12 o'clock, noon, of April 22nd, 1889 and was, therefore, disqualified to make homestead entry of any land then open to settlement in said Territory; (R. p. 18). That similar affidavits of contest were filed against the said entry of James W. Feagins by J. M. Patterson, Ezra Maples, Henry H. Bockfinger and others, but, as Patterson subsequently dismissed his contest and all other contestants, except Maples and Bockfinger, made default at the hearing, it is not necessary to refer to them further; (R. pp. 19, 20). That the contest of Ezra Maples was filed on the 3rd day of May, 1889, and on May 16th he made a homestead application for the said Southwest Quarter of said Section 8, Township 16 North, Range 2 West, I. M., which said application was rejected for conflict with the entry of record, from which rejection he took no appeal; (R. p. 25). That the contest of Henry H. Bockfinger (appellant herein) was filed May 24th, 1889, alleging the disqualification of said Feagins, Patterson and Maples to make homestead entry of lands in said Oklahoma Territory; (R. pp. 5, 20, 25). That on June 19th, 1889, an application was filed by James Dooley to enter the west half of said Section 8 as a townsite for the use and benefit of the occupants of the claimed townsite of West Guthrie; (R. pp. 5, 17). That on April 20th, 1900 said Bockfinger made settlement thereon and has ever since resided upon, cultivated and improved said tract.

That no action was taken by the Register and Receiver of the local land office looking to the ordering of hearings on the affidavits of contest against the said entries of Cohn and Feagins, and the townsite application having been transmitted to the General Land Office, the Commissioner, by letter "G," of October 23rd, 1889 ordered a hearing on said townsite appli-

cation to be conducted in accordance with his previous general instructions of August 8th, 1889 in townsite matters wherein the local officers were directed to ascertain when the land included within such application was first actually selected and occupied for townsite purposes, the number of inhabitants thereon, the character and location of all municipal improvements, both at the date of filing such application and at the time of hearing. In addition to these general instructions contained in the Commissioner's said letter of August 8th, 1889, which was referred to for their guidance, the Register and Receiver of said Guthrie Land Office were further specifically instructed as follows:

"The object of this hearing is certainly to determine the right of the townsite claimants, and I hereby direct that the only question you should inquire into in addition to those mentioned in my former letter is the qualifications of the homesteaders as such at the date of making their entries." (R. pp. 5, 26).

Under these instructions the rights of the applicants to contest the homestead entries, were not fully considered; in fact, were not inquired into, except as to the dates of filing their contests and of their respective settlements on the land, and the hearing was mainly confined to the inquiries as to the qualifications of Cohn and Feagins, who had respectively entered the Northwest and Southwest quarters of said Section 8, under the homestead law, and to the claims of the townsite applicants. (R. pp. 5, 26, 29.)

As a result of this hearing the local officers found that Cohn and Feagins were "sooners" and, therefore, disqualified, from procuring title to said quarters, and acquired no rights by their said homestead entries. That townsite settlers to the number of 150 to 200 crossed the Cottonwood Creek which they supposed to be the west line of the east half of section 8, about 4 o'clock in the afternoon of the 22nd of April, at a point on the northeast forty of the southwest quarter, and staked off lots on a small portion of said forty, also upon the northwest quarter and that portion of the

northeast quarter of said section 8, lying west of the Cottonwood Creek. That said persons then and for several days thereafter, believed that the Cottonwood Creek formed the west boundary of the east half of said section and that all west of it was on the west half of the section. They also found that, on the evening of April 22nd, 1889, said parties held a mass meeting and took the initial steps to organize a town to be known as West Guthrie and to be located on what they supposed was the west half of said section 8, and subsequently elected town officers and in the early part of May had the northwest quarter and that part of the northeast quarter lying north and west of said Cottonwood Creek and the small portion of the northeast quarter of the southwest quarter of said section 8, lying north of said creek surveyed into lots, blocks, streets and alleys. That some of the persons who located on the said portion of the northeast quarter of the southwest quarter remained on the lots staked by them, that other persons settled on said porion of said forty, all aggregating 30 or 40 in number, on June 15th, 1889, when they were forcibly removed by the military. That none of the parties so removed ever returned to their said former locations, and no part of the said southwest quarter of said section 8, was ever thereafter occupied by townsite claimants up to the date of the decision of the said Register and Receiver, to-wit, December, 4th, 1900. (R. p. 17.) That the portion of said southwest quarter lying south of said creek, to-wit: the south half and the northwest quarter had not only never been occupied by townsite claimants but had never been surveyed into lots, blocks, streets and alleys. However, they awarded the northwest quarter and the northeast quarter of the southwest quarter to the townsite claimants and recommended a further hearing to determine the rights of the respective homestead claimants to the three remaining 40's of the said southwest quarter. (R. p. 22.)

The Hon. Commissioner of the General Land

Office, in his decision of August 4th, 1891, affirmed the decision of the local officers as to their findings of fact, but modified the decision as to said southwest quarter by awarding the entire quarter to the townsite, upon the theory that, under the law, the settlement of 100 or more inhabitants upon any part of the half section entitled them to select the whole 320 acres as a townsite prior to the date of the passage of the act of May 14th, 1890, which, he concedes, limited such selection to the legal subdivisions actually occupied for purposes of business and trade. (R. pp. 24, 29.) He, therefore, held that, when proof was offered for the purpose of entering said half section as a townsite, the homestead claimants would be permitted to show what legal subdivisions thereof were not occupied for municipal purposes prior to and on said May 14th, 1890, and, upon such showing being made, a further hearing should be had to determine which of the homestead claimants was entitled to make entry of same. (R. p. 30.)

Feagins, Maples and Bockfinger appealed to the Secretary of the Interior, who, on December 16th, 1891, decided unqualifiedly in favor of the townsite as to the entire west half of said section 8. (R. pp. 30 et seq.) Bockfinger alone filed a motion for a review of said departmental decision and a motion supported by affidavits for a rehearing of said cause. These motions were overruled by the Secretary on October 3, 1892. (R. pp. 32-47.) It is further alleged in said complaint that Henry H. Bockfinger (appellant) was and is a native born citizen of the United States, over 21 years of age and, in all other respects, qualified to make homestead entry for the land in controversy. (R. p. 4.) Also "That there was no townsite settlement or occupancy or improvements for townsite purposes upon the southwest quarter of section 8, until after the 16th day of December, 1891," and after the decision of the Hon. Secretary of the Interior of that date had been announced. (R. p. 9.) It is further alleged in said complaint that appellant made application to enter the land

in controversy as a homestead on the ———— day of November, 1892, and before said tract had been entered by appellees as such townsite trustees and while same was public land of the United States, and that he (appellant) applied to make final entry thereof and to make **his final proof therefor, at the same time tending to** the register and receiver of the said Guthrie land office the sum of $1.25 per acre for each acre contained in said tract and the requisite sum to pay the commissions and fees for entering said land as a homestead and making final proof therefor; (R. p. 14.) Also that he made a tender to said trustees, prior of a sufficient amount to fully reimburse them for the sums expended to the commencement of this action, in procuring patent for said tract. (R. p. 15.)

After patent for said half section of land (except 17.9 acres reserved for a public park) had been issued by the President of the United States to John W. Foster, W. S. Robertson and A. C. Schnell, as trustees of townsite board No. 6, for the use and benefit of the occupants of said tract, and before said trustees had conveyed any portion thereof, and on February 25th, 1893, this action was commenced. On the same day a *lis pendens* notice was filed and on April 16, 1893, defendants filed a motion to require plaintiff to separately state and number the several causes of action stated in his complaint, which motion was on same date overruled. On April 25th, following, defendant filed a demurrer to plaintiff's complaint upon the following grounds:

1. That said complaint does not state a cause of action against these trustees.

2. For the reason that the District Court has no jurisdiction of the subject of the action.

3. For the reason that said court has no jurisdiction of said defendants in their capacities as trustees of townsite board No. six, as set out in the complaint.

4. That there is a defect of parties defendant in this, that each and every of the lot claimants upon the land described in the complaint should be made parties

defendant in this action. (R. pp. 49, 50.)

This demurrer was sustained, on October 23, 1894, by the District Court of Logan County, said Territory, whereupon an appeal was duly prosecuted to the Territorial Supreme Court where the judgment of the District Court was affirmed on September 5th, 1900. (R. pp. 53, 57.)

Thereafter and on September 4th, 1901, the said Henry H. Bockfinger procured an order of the Supreme Court of Oklahoma allowing an appeal to this court and he alleged the following assignment of errors on his said appeal, all of which he still asserts and urges, to-wit:

"1. The Supreme Court of the Territory of Oklahoma erred in holding and deciding that: "In an action against townsite trustees appointed by the Secretary of the Interior under the act of Congress of May 14, 1890 (26 Stat., 109, c. 207), and to whom patent has issued, to declare a resulting trust in favor of a plaintiff who claims adversely to the townsite entry, even if such action would lie, the townsite-lot claimants are necessary parties to the action."

2. The said Supreme Court erred in holding and deciding that: "The conveyance of a townsite to such trustees is for a particular use named by Congress, and the courts cannot intercept the legal title in the hands of the Government's agents. Adverse claimants for such townsite must wait until title has lodged in the persons, or is put to the uses directed by Congress. Therefore such townsite trustees cannot be adjudged by a court of equity to be trustees for the use and benefit of one claiming adversely to the trust created by the act of Congress under which patent was issued to them, and a petition which discloses on its face that the trustees have not conveyed the title by deed, but still retain the same, fails to state a cause of action for a resulting trust."

3. Said court erred in deciding that the petition of plaintiff in error did not state a cause of action, and, thereby affirming the judgment of the trial court.

4. Said court erred in not deciding said cause upon its merits and in not rendering judgment therein, in favor of plaintiff in error, reversing the judgment of the trial court and directing it to enter a judgment for said plaintiff in error (plaintiff below)."

Some additional material facts are stated in the argument which follows.

Argument.

I. ON QUESTION OF PARTIES DEFENDANT.

The Supreme Court of the Territory of Oklahoma decided this case on two propositions, holding,

FIRST: That, conceding that the action would lie against the Townsite Trustees, the *cestui que trustents* or some of them are necessary parties defendant.

SECOND; That the action will not lie against the said Townsite Trustees because they are officers or agents of the Government and that, therefore, complete title to the tract of land involved herein had not passed from the Government by the execution of the Patent to them for the use and benefit of the occupants of said tract for townsite purposes.

We shall consider these questions in inverse order, because, if the action will not lie at all against the Townsite Trustees for the reasons assigned, then the court had no such jurisdiction of the subject of this action, at the time it was commenced, as would authorize the rendition of any judgment whatever affecting the title to the land in controversy or, differently stating it, the court lacked the power, under the facts stated in the complaint, to render any other judgment than one dismissing the action; and this, being a jurisdictional question, or one involving the power of the court to render any judgment on the merits of the action, lies at the very threshold of the matters presented for consideration and, consequently, should be

determined before any other question involved in the cause is considered.

This part of the decision of the Oklahoma Supreme Court is based almost entirely upon the principles laid down by this Court in the case of McDaid vs. The Territory, 150 U. S. 209; 37 L. Ed. 1055. Justice Burwell, who wrote the opinion of the court below in this case, after quoting from the McDaid case, draws the following conclusion therefrom:

"By this opinion the highest Court of the land has settled that these trustees are simply Government agents, that they hold the legal title only for the uses and purposes named in the Act of Congress under which the agency was authorized and that until conveyance is made by the Trustees the land included in the patent is subject to the supervision of the executive branch of the Government." (R. p. 65.)

Arguing from this (we think) erroneous premise, the court below proceeds to show quite conclusively that, so long as the title to public land remains in the Government, courts of equity have no power to adjudicate matters affecting such title. The Act of May 14th, 1890, specifically provides that, "when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided." If, as stated in this Act, "the title of the United States to the land * * * * * shall be conveyed to said trustees," surely the title does not remain in the United States after the conveyance. Clearly then, so far as the rights of the homestead claimants are concerned, the entire title of the Government passed to these trustees by the execution of the patent. The supervisory power vested in the Secretary of the Interior by said Act could, in no wise, affect their interests, which were antagonistic to the purposes of the trust. A grantor may, by a conveyance in trust for the use and benefit of certain other persons, completely devest himself of all title to the land so conveyed and yet this title may not vest in the beneficiaries for many

years thereafter. The distinction claiming we are attempting to make, between the position of a homestead claimant whose rights are anterior and antagonistic to the purposes of the patent issued under said Act and that of a townsite occupant claiming under the patent but adversely to another such occupant, is, we think, clearly recognized in the carefully worded opinion of this court in the McDaid case, wherein, among others, we find the following statements concerning the effect (upon the title) of the patent from the government to these trustees:

"While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was explicitly declared as made "for the uses and purposes in the Act provided," and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary for which the Secretary's regulations provided. By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained. The Act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard." (150 U. S. 219-220.)

Thus, it is seen that it was only in settling conflicting claims to lots and ascertaining the surplus or undisposed of lands that any control remained in the Land Department and nowhere in said opinion is it

suggested that the government retained any interest in the land or the title thereto after the issuance of the patent to said trustees. The fact that said Act of March 14th, 1890, authorized the Secretary of the Interior to supervise the execution of this trust and, among other things, to provide for a review of the decisions of the trustees on disputed questions arising between contesting lot claimants, can hardly be considered as any evidence whatever that Congress did not intend the complete title of the government should pass to said trustees by the issuance of the patent to them. Instead of authorizing the Secretary of the Interior to provide for such review of said decisions, Congress could have provided for an appeal therefrom directly to the courts of the Territory or to any other designated tribunals and it certainly could not then be contended that, because of the provision for a review of such decisions by the courts or other tribunals, the title to the entire tract had not passed from the United States.

Another reason why we believe it must be held that the patent from the United States to the townsite trustees devested the Government of all title to the land, is, that there is no provision in the patent or in the act under which it was issued for such land, or any portion thereof, to revert to the government, in any event, and, if such patent were procured by fraud or issued by mistake the only way the Government or any one else could avoid same would be by an action in a court of equity. Van Wyck vs. Knevals, 106 U. S., 360; 27 L. Ed. 201; Germania Iron Co. v. United States, 165 U. S., 379.

As to when the title of the United States to public land is devested, see the dissenting opinion of Justice McAtee in Paine v. Foster et al., 9 Okl., 286; 60 Pac., 32; and the case, therein cited, of United States v. Schurz, 102 U. S., 402; 26 L. Ed., 173. See also Wilcox v. Jackson, 13 Pet., 498; 10 L. Ed., 264, wherein it is held that, " where a patent has not been issued for a part of the public lands, the state has not the power

to declare any title, less than a patent, valid against a claim of the United States to the land, or against a title held under a patent granted by the United States;" and, in the body of the opinion, Mr. Justice Barbour, speaking for the court, says, "we think it unnecessary to go into a detailed examination of the various acts of Congress for the purpose of showing what we consider to be true in regard to public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. But in this case no patent has issued, and therefore by the laws of the United States the legal title has not passed, but remains in the United States." (pp. 516-517.) That the legal title of the United States to the land in controversy passed to the townsite trustees by the issuance of the patent, cannot be disputed. See Re. Emblen, 161 U. S., 52; 40 L. Ed. 613; wherein it is said that; "After the patent has once been issued the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentees, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor."

The mere fact that this patent was made to trustees of an express trust has no tendency to defeat the passing of complete title as, in order for a patentor to retain any interest in the title or estate conveyed, even though such conveyance is to trustees for certian specific uses, there must be a provision in the patent for the reversion of the estate to him in the event of the failure of the uses or purposes for which the grant was made. Stewart v. Easton, 170 U. S., 384; 42 L. Ed. 1078. See also, Bryan v. Forsyth, 19 How., 334; 15 L. Ed. 674; Meehan v. Forsyth 24 How., 175; 16 L. Ed. 730; Cowell v. Colorado Springs Co., 100 U. S., 55; 25 L. Ed. 547.

In the case last cited the question of when title passes from the United States is also discussed, Mr. Justice Field, who delivered the opinion of the court,

saying, "The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through *mesne* conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word 'trustee' without mention of any trust upon which he is bound to hold the property. It is, therefore, contended that he must be considered as holding it for some undeclared use of the grantor, and that, consequently, he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or advanced the purchase money." See also Re Emblen, supra, (161 U. S., 52; 40 L. Ed. 613).

The patent covering the land in controversy runs to the trustees, their successors and assigns, without reservation, and payment of the purchase price required by the United States for said land is duly acknowledged, except as to the 17.9 acres reserved for park purposes (see appendix).

The rule is settled that, if the title to the land in controversy passed from the United States by the issuance of the patent, it matters not that said title vested in trustees who were agents of the government, as these agents could be sued by one who had a prior right to and equity in the land the same as if they held the legal title thereto in any other capacity. United States v. Lee, 106 U. S., 196; 27 L. Ed. 171.

The interpretation which we have given said Act of May 14th, 1890 is entirely consistent with the doctrine announced in the McDaid case, and the fact that this court took jurisdiction of the subject matter in the case of Payne v. Robertson et al., 169 U. S., 323, and decided same on its merits subsequent to the decision of the McDaid case is surely conclusive of both ques-

tions upon which this case was decided in the court below, as that case was brought against the same townsite trustees and the identical questions, upon which the case at bar was decided by the Supreme Court of Oklahoma, were raised and urged therein.

We next come to the other ground upon which the Oklahoma Supreme Court based its decision against appellant, to-wit; That the beneficiaries under the patent to said trustees were necessary parties defendant. In this connection, it is well to observe that, at the time this action was commenced, no deeds had been executed to lot claimants and they were, at that time, wholly unidentified and said trustees were the only parties who could, in the first instance, identify them, that is, declare what claimants were entitled to deeds for particular lots. Under these circumstances, it would have been necessary for appellant, who claimed the tract of land involved herein, to have waited until these various lot claimants had not only presented their applications to the trustees but had succeeded in procuring title to the several lots, even though this might and certainly would (in many instances) have required several years, by reason of successive appeals from the decisions of said trustees to the Commissioner of the General Land Office and the Secretary of the Interior, to settle conflicting claims as between said occupants.

Furthermore *bona fide* purchasers from lot claimants after the latter had received deeds from said trustees would probably have been protected against subsequent actions brought by appellant to set aside such deeds.

United States v. Wenona & St. P. R. R. Co., 165 U. S., 463; 41 L. Ed. 789.

United States v. Union P. R. R. Co., 165 U. S., 482; 41 L. Ed. 797.

It would have been practically impossible for appellant to have brought suit against each lot claimant receiving a deed from said trustees before he could

have made a conveyance to a purchaser in good faith.

It is admitted in the opinion of the Court below that, to compel plaintiff to wait until deeds were issued to the lot claimants before commencing his action, would probably work a great hardship upon him, but it is said that, "Congress has, in effect, so provided and its will is supreme." (R. p. 67.) If the Act of May 14th, 1890 so clearly enforces the interpretation given it in this case by the Court below, is it not passing strange that said Court did not discover this fact in deciding the case of Paine v. Foster et al., on rehearing, (9 Okl., 257) the opinion therein being filed November 7th, 1899 and delivered by the same Justice who delivered the opinion of the Court in the case at bar? Instead, however, of so interpreting said Act of Congress in the last decision of the Paine case, the Oklahoma Supreme Court says, "This opinion, written by Justice Burford, we now adopt as the opinion of the Court, except that part referring to defect of parties," (pp. 258-9.) thereby deciding said cause on its merits.

In support of its holding that there is a defect of parties defendant in this action, the Court below also states that, "before the trustee could defend the equitable title of the beneficiary of the deed, his power should be such as to make him the agent of such beneficiary, for under our statutes every action must be prosecuted or defended by the real party in interest." (R. pp. 60-61.) This action was commenced under the Civil Code of 1890, adopted substantially from the Warden Brief, Galley Five ..... Coffin Civil Code of the State of Indiana, which was repealed by the adoption of the Civil Code of 1893, which latter took effect August 14th, of said year, but the provisions of both Codes on the question of parties to actions are almost identical, and, so far as applicable to the question under consideration, are the following: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," etc. Sec. 1, Art. 2, Chap. 70 Okl. Stat., 1890; sec. 26, Chap. 66, Okl. Stat. 1893.

"An executor, administrator, a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." Sec. 2, Art. 2, Chap. 70 Okl. Stat., 1890; Sec. 28, Chap. 66, Okl. Stat. 1893.

The rule applicable to such code provisions is correctly stated in the 15th Enc. Pl. & Pr. 731, as follows: "The provisions in the codes creating exceptions to the general rule that actions must be prosecuted by the real party in interest, although merely purporting to authorize actions by executors, administrators, trustees of express trusts, persons expressly authorized to sue, etc., have been held also to authorize actions against such persons without joining the real parties in interest." That the defendants in the case at bar were the trustees of an express trust will not be controverted, hence, it seems clear that, under the code provisions just quoted, the action can be maintained against the trustees without joining therewith the *cestui que trusts.*

It is further provided in each of said codes that: "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the Court must cause them to be joined as proper parties. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the Court to be made a party, it may order him to be made a party by the proper amendment." Sec. 22, Art. 2, Chap. 70, Okl. Stat., 1890; **Sec. 41 and 42, Chap. 66, Okl. Stat., 1893.**

Again, under the interpretation given by the Supreme Court of Indiana, to the Code provisions in force in Oklahoma at the time this action was commenced, the demurrer on the ground of defect of parties defendant is fatally defective as, to be sufficient in this regard, it should specifically point out and

designate the proper parties by name. Kelly v. Love, 35 Ind., 106; Durham v. Bischof, 47 Ind., 211.

Our contention on this question is that the townsite trustees were the proper parties defendant and that, upon the record in this case, the *cestuis qui trust* were neither necessary nor proper parties. We think this question is settled by the decision in the case of Vetterlein vs. Barnes, 124 U. S., 169. But the Supreme Court of Oklahoma attempts to distinguish this case and to show that it is not in point. We submit that the Oklahoma Court has misconceived the doctrine of this case. As we understand the case, it holds exactly the opposite of what the Oklahoma Court held. The principle involved is very aptly stated in Rogers vs. Rogers, 3 Paige 379 cited in Veterlein vs. Barnes, as follows:

"As a general rule, the *cestuis qui trust* as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fradulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestuis qui trust*"

The use of the word "fradulent" in the opinion, is merely accidental, not essential. It relates to the circumstance, not to the principle. The principle is that where the plaintiff attacks the trust upon an antecedent right, and seeks to have it declared void, he may proceed without joining the beneficiaries. In the Rogers case (also in the Vetterlein case) the ground of the attack was fraud, upon which it was sought to have the trust declared void. But any other ground would have answered equally well, and would not affect the principle. If the trust is void for any reason, this is sufficient. To make a distinction in the case of fraud so as to say, you may attack a trust on the ground of fraud without joining the beneficiaries, but if you at-

tack it on any other ground, you must join them, would be purely arbitrary. The trust can only be void, it cannot be more than this. If it is void, or voidable, it is not material what the ground is; it is not more void because it is fradulent. Hence, we say the use of the word "fradulent" ("fradulent and void") in the cases cited, is merely incidental, and does not go to the principle involved.

This court held in the Vetterlein case, that the beneficiaries were not necessary parties for the reason, as stated by the court, that:

"The assignment of the policies in question in trust for the wife and children of the assignor, the trust having been accepted, carried with it, by necessary implication, authority in the trustees, by suit or otherwise, to collect the insurance moneys for the beneficiaries. Indeed, they could not have otherwise fully discharged the duties they assumed as trustees. They were entitled to represent the beneficiaries in their claim for the insurance money, and were under a duty to defend any suit, the object of which was to prevent the discharge of that duty and set aside the transfer of the policies as fradulent and void."

This is in harmony with the distinction made by the authorities, and obviously supported by reason that, where the complainant claims in opposition to the trust and seeks to set aside the same on the ground that it is void, it is unnecessary to join the *cestuis qui trust*. Mr. Pomeroy has stated the principle and its underlying reasons so clearly that we cannot do better than quote his language:

"There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a mullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and

defend for them. In the second, all the beneficiaries must be joined, if not as plaintiffs, then as defendants, so that the whole matter may be adjusted in one proceeding, and a multiciplicity of suits avoided. The reason of this distinction is obvious. It is, that any one person interested in opposition to the trust has a right to test the validity thereof and his voluntary action cannot be controlled by the will of others, while the trustees themselves are sufficient to represent and defend all the interests of those who claim under the trust. But when the trust is assented to, and the purpose is simply to carry out its provisions, all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding. As illustrations of this principle: In an action brought to set aside a trust deed made by a railroad company to a trustee for the benefit of bondholders, and to restrain a sale of the road thereunder, the beneficiaries under the trust were declared not to be necessary or even proper parties, and the application of one of them—a bondholder—to be admitted as a defendant was denied, although he alleged that the trustee intended to make no defense, and was actually colluding with the plaintiff and the company." Pomeroy's Remedies, Section 357.

We claim that the trust was created in derogation of appellant's rights and is void, or voidable, as against him. We seek to strangle it in the nest. It is created, and we instantly attack it. We do not wait for the trustees to act (as by giving deeds) but we proceed at once to challenge their authority and to prevent their acting. The whole estate was held by them when we commenced our action. We could not, at that time, have joined any other persons if we had wanted to. No townsite deeds had been issued and we had no way of knowing who the beneficiaries were. Our objection was to the trust itself, not to the individuals who claimed under it; if the trust was good it was immaterial to us who the beneficiaries were. Of course,

we ask in the complaint that the trustees be decreed to hold the title in trust for us. But this is *ex necessitate*. We contend that the land should have been patented to us, but that it was wrongfully patented to the townsite trustees. Since the government has issued the patent to the townsite trustees, when it should have been issued to us, we ask that the trustees be decreed to hold the title in trust for us. There is no inconsistency in the attack which we make on the trust and the prayer of our complaint. The trust which we ask to have declared is a separate and entirely different one, being, of course, antagonistic to the trust which we seek to defeat.

It seems to us, as held by the Supreme Court of Minnesota, and as approved by Professor Pomeroy, *supra*, that, in a case like this, the beneficiaries are not only not necessary parties, but not even proper parties. So far as we have any hostility to them, it is a common, uniform and general hostility, applying to all alike. It is only a constructive hostility, dependent upon their claiming under the trust, so that if we defeat the trust we defeat all of them, and as their rights are all precisely the same, the trustees are in a position to protect all of their rights perfectly, as there is nothing for the trustees to do to protect their rights but defend the title in themselves. In defending themselves, they are defending all the beneficiaries and a in favor of the *cestuis qui trust*. The latter have no judgment in favor of the trustees is equally a judgment diverse or peculiar interests to be protected. They simply have a common interest, and the only question involved in the case is the validity of the trust which can be as perfectly tried, ascertained and determined in an action against the trustees alone as it could be if all the beneficiaries were joined. There being nothing whatever to be gained by joining the beneficiaries, it follows that it is unnecessary to join them. It was very aptly remarked in the Vetterlein case that when the trustees accepted the trust, it became a part of their duty to defend the trust, and to

endeavor to carry it into effect. It is a principle of law that a trust shall never fail for want of a trustee and it is equally a principle that the law affords a remedy to carry trusts into effect. If the trustees had failed to do their duty in this regard, by failing to defend the trust, the court would, on a proper showing, either have compelled them to defend, or have permitted the beneficiaries to intervene and do whatever was needful to protect their interests. This, however, would come within the discretionary powers of the court. It is an inherent power of the courts, and it is specifically provided by the Statutes of Oklahoma, that the court may permit parties to be brought in whenever it is necessary to accomplish the ends of justice and, in this case, if the *cestuis qui trust* had come in and shown to the court that their rights were not being properly protected there is no doubt that the court would have made such order as would have been necessary to protect their interests. We stated in the outset of our discussion of this question that, upon the record in this case, the beneficiaries were neither necessary nor proper parties. We made this statement advisedly, meaning thereby that, so far as the record shows, the trust is being fully defended. The beneficiaries have never applied to the court to be allowed to intervene as parties defendant nor is it apparent that there was anything to be gained by admitting them as such parties. Their rights are being fully protected and it would be of no advantage to them to be in the case as parties. If it were apparent on the record that their rights were being jeopardized by reason of their not being made parties, and they were asking to intervene, the court might very properly say that they ought to be made parties. But in order to require this to be done a very strong showing should be made. The Minnesota court refused to admit the beneficiaries, although it was contended that the trustee did not intend to defend the case and was actually colluding with the plaintiffs. We do not mean to indicate just what kind of a showing would have to be

made in order to justify the court in admitting the beneficiaries as parties defendant. We merely mean to say that, on a proper showing, the beneficiaries might have been admitted as such parties. It is apparent in this case that the beneficiaries have no special or peculiar rights as against the claim of appellant, but that their rights are in common, so that a defense of the trust is a full and perfect defense as to them. Under these circumstances, we have exactly the case which is presented in Vetterlein vs. Barnes, where it was held by this court that the beneficiaries were not necessary parties. In that case the trustee had accepted the trust and was performing his duty in defending it, and in doing so he was defending the beneficiaries. The same is true here. The trustees accepted the trust, and, upon the record, they are defending it. In fact, the Government itself is assisting in making this defense. To our minds, the dissenting opinion of Justice McAtee, in the case of Paine vs. Foster, et al. *supra*, states the law correctly on the question of parties and is in strict harmony with the doctrine of Vetterlein vs. Barnes, and the authorities cited in Pomeroy on Remedies, Section 357, especially Winslow v. Minn. & Pac. R. R. Co., 4 Minn., 313. See also New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Wakeman v. Grover, 4 Paige Ch. 22.

As hereinbefore shown, it would have worked a very great hardship on appellant to have required him to make all the lot claimants parties defendant if, in fact, the performance of such a requirement would not have been impossible. The impracticability of making all the *cestui que trusts* parties to actions of this character is one of the principal reasons for the exception to the rule requiring them to be brought in.

"The trustees are sufficient for the purpose of this bill, which is for the selling of the pledge; it would have been intolerably oppressive and burdensome to compel the plaintiff to bring in all the *cestui que trust*. The delay and expense incident to such a proceeding would be a reflection on the justice of the court." Van

Vechten v. Terry, 2 Johns. Ch. 191.

"The impracticability of making all the persons interested parties, is a sufficient ground for dispensing with them." Land Co. v. Peck, 112 Ill., 408.

"In the case we are considering, the trustee was a proper person to represent the interest of his *cestui que trusts;* and to have required complainants, at their peril, to ascertain and bring in every person holding or beneficially interested in any one of the bonds, would have been to impose upon them a task most difficult, if not actually impossible, to be performed. It would have been almost equivalent to denying them the aid of the court in the enforcement or foreclosure of their mortgage. The holders of the bonds were not, therefore, necessary parties; and the proceedings and decree, without them, are as valid as if they had been brought in." Board of Supervisors v. Mineral Point R. R. Co. 24 Wis. 93 (See page 128).

"Where the bond holders secured by mortgage on a railroad are numerous, it is not necessary to make all of them parties to a suit, or to make any of them parties, if their trustees are parties." Campbell v. R. R. Co., 1 Woods (U. S.) 368; 4 Fed. Cases No. 2366.

"The doctrine of representation of the *cestui que trust* by his trustee is especially applicable where the beneficiaries are numerous or where for some other reason it is impracticable to make them parties." 22 Enc. Pl. & Pr. 165.

II. ON MERITS OF ACTION.

While the court below declined to determine or discuss any proposition involving the merits of this action, we shall, upon the assumption that this court will (in the event the views of the lower court are not approved)decide same on its merits, state and briefly discuss some of the principal points which we conceive to be so involved.

FIRST POINT.

Our first contention is that, under the undisputed

testimony introduced at the trial of the case of the Townsite Settlers of West Guthrie v. Mark S. Cohn, et al., before the United States land office, as shown by findings made a part of appellant's complaint, and the law applicable thereto, the half section of land involved could not have been legally occupied as a townsite until after May 14, 1890, for the reason that the east half of the same section had been previously occupied and taken as a townsite, which occupation has been, in good faith, continually followed up, and the tract was patented for townsite purposes long before any patent was so issued for the west half of said section. (R. pp. 16, 24.) We claim that, under the law governing such cases prior to May 14th, 1890, the same body or aggregation of people, at substantially the same time, could only take one-half section of contiguous land as a townsite. The last clause of section 13 of the Act of Congress opening Oklahoma to settlement is as follows:

"The Secretary of the Interior may, after said proclamation and not before, permit entry of said lands for townsites under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land." (Gen. Sec. 58, Oklahoma Stat., 1893; 25 Stat. 1005.)

Does this provision mean that a large body of people, consisting of several thousand, can rush upon a half section of land and commence occupying same as a townsite and immediately thereafter, because the original tract is not sufficiently large to accommodate all who desire lots, commence to overflow upon other adjoining half sections and occupy and acquire title to them also as townsite? If such a construction is to be given this clause then what is the purpose of the limitation therein contained? It would seem absurd to hold that its only purpose was to compel the occupants, when they desired more than 320 acres of adjoining land for townsite purposes, to establish and support separate townsite organizations and make separate

entries and proof of occupancy for each 320 acre tract so desired. We think the clear and unmistakable meaning of Congress was to limit the amount of contiguous territory which could be taken and used for townsite purposes to one-half section, thus leaving all adjoining tracts for the use and benefit of those who were, in good faith, seeking homesteads. In fact, Congress, itself, has, by what is known as a legislative interpretation, given the above clause the construction just stated, by the Act of May 14th, 1890, declaring, "That so much of the public lands situated in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of Revised Statutes as near as may be." (Sec. 118, Ok. Stat. 1893.) This act was passed after it had been made apparent to Congress that, in many instances, more than 320 acres of land in one body was and would be necessary for townsite uses in Oklahoma. But, if as many adjoining half sections as were needed for such purpose could, in any case, be taken and proved up separately under the then existing law, what was the real necessity for the latter enactment enlarging the maximum limit to 1280 acres? If several contiguous 320 acre tracts could be taken for such uses under the former enactment, it is apparent that an equal number of contiguous 1280 acre tracts can be so taken under the latter.

SECOND POINT.

But, no matter how this court may determine the proposition just urged, the Secretary of the Interior unquestionably committed manifest errors of law in deciding said land contest case in favor of the townsite

claimants, as against the rights of this appellant. Here we desire to call attention to some additional facts shown by the undisputed testimony and found by the various deciding officers of the Land Department. They are the following:

1. That, at the date of the application of James Dooley to enter said west half of section 8 as a townsite, viz: June 19, 1889, and at all times subsequent thereto down to the close of the trial of said contest case in the local land office, no person was occupying, in any manner, or making any kind of claim to any portion of the said south-west quarter of section 8, as a townsite settler or occupant. (R. pp. 17, 22.)

2. No one, as a townsite occupant, ever at any time prior to said trial, settled upon, occupied or claimed any interest in or to any portion of said South-west quarter, except upon and to the small portion thereof included within what is known as the nook or bend of the Cottonwood and on the north side of said creek—the same being about five acres in the north-east corner of said quarter section. (R. pp. 17, 24.)

3. The townsite applicants of and claimants to this five acre tract, if in fact there ever were any, were removed therefrom on the 15th day of June, 1889, by the military forces and none of the parties so removed ever attempted to re-settle or re-locate upon any portion of said quarter section, and never thereafter laid any claim to any portion thereof. (R. p. 17.)

The register and receiver of the Guthrie land office make, among others, the following findings of fact relative to the settlement, occupancy and improvement of the different legal subdivisions of the west half of said section 8, by townsite claimants:

"The east half of section 8 and the west half of section 9 were settled upon by several thousand people for business and trade by 3 o'clock p. m., April, 1889. At about 4 o'clock of said day from 150 to 200 people crossed said Cottonwood creek at a point on the north-east forty of the south-west quarter of said section and staked off lots on a part of said forty north

of said creek and also upon the north-west quarter of said section, also upon that part of the north-east quarter of said section which lies west of said creek. Such persons then and for two or three days thereafter, believed that all west of the creek was on the west half of said section. On the evening of April 22, 1889, said people held a mass-meeting and organized a town to be known as West Guthrie, to be located on the west half of said section eight and elected town officers and took steps at a meeting held on the following night to have said half section surveyed into lots, blocks, streets and alleys, which survey of all that part of said half section north and west of said creek, to-wit: the north-west quarter and a part of the north-east forty of the south-west quarter of said section, was completed during the early part of May of said year. Some of the persons who went upon the north-east forty of the south-west quarter of said section, remained on the lots staked by them. Other persons settled upon said forty acre tract and claimed lots, aggregating 30 or 40 in number on June 15, 1889. They, prior to that date, had planted garden, fenced lots, erected tents and a few small buildings, built foundations and began the erection of houses. On said date they, by the military forces of the United States, at the instance of some one of the homestead claimants, but which one does not appear, were ejected from said tract of land, and their improvements removed, for the reason given that the land had been taken as a homestead. Since said date and said removal, said tract has not been occupied by townsite claimants. The part of said south-west quarter, of said section south of said creek, to-wit: the south half and the north-west quarter, has never been surveyed into lots, blocks, streets and alleys." (R. p. 17.)

None of these findings of fact were disturbed, but, in fact, all were affirmed both by the Commissioner of the General Land Office and the Secretary of the Interior. The following findings of fact, relative to the townsite settlement, occupancy and improvement of the west half of said section 8, are also contained

among those made by the Commissioner:

"The townsite settlement on the north-west quarter of section 8 has been continuous since the first rush until the day of hearing, at which time 400 people resided and did business thereon, with improvements to the value of $30,000.00. This settlement and improvement on the south-west quarter of section 8 was more meagre and appeared to have been confined to the north-east quarter of the south-west quarter and more particular to the neck of land formed on the north side thereof by a crook in the creek; some of the townsite settlers remained, and on June 15th, 1889, numbered about 30 or 40 having houses, gardens, etc. On that day the military forces of the United States ejected these settlers in the interest of some of the homestead claimants and removed their improvements." (R. p. 24.)

These findings, as well as all others made by the Commissioner are specifically approved by the Secretary, the latter saying in his decision of December 16th, 1891:

"The voluminous record in this case has been examined, and it has been found that your decision contains a succinct statement of the facts in the case." (R. p. 31.)

Upon the law question presented by the foregoing facts the register and receiver make the following conclusion and recommendation:

"Remaining portions of said south-west quarter, (meaning all that portion thereof except the small tract contained in the neck formed by a bend in the Cottonwood creek and on the north side of said creek) have never been surveyed into lots, blocks, streets or alleys, and have never been settled upon and occupied for the purpose of business and trade. The rights of several homestead claimants attached before an application was made to enter the same as part of West Guthrie and are superior to the claim made to the same for the purpose of business and trade. We, therefore, recommend that homestead entry No. 1 of Mark S.

Cohn and homestead entry No. 17 of James W. Feagins be held for cancellation; that on proper application therefor, the occupants of the north-west quarter and the north-east quarter of the south-west quarter, Tp. 16 North, Range 2 West, be allowed to make entry of the same under the provisions of the act of May 14, 1890, and that a hearing be ordered to determine the rights of the several homestead claimants to the residue of the said south-west quarter." (R. p. 22.)

The Commissioner held as follows thereon:

"The original Oklahoma Act provided for the townsite entries not to exceed 320 acres, but no provision was made as to the proper method of making such entries. The Act of May 14, 1890, relieved this question, and ratified the applications then pending. Although the town did not at date of such application cover or occupy each legal subdivision, the occupation of any portion of the land selected and settled upon by 100 or more inhabitants warranted the selection of 320 acres and the consequent withdrawal of the entire tract. You seem to have been guided by a contrary view and awarded to the town the north-west quarter and the north-east quarter of the south-west quarter of section 8, as being the tracts actually settled for town purposes. In this you erred. Up to and prior to the Act of May 14, 1890, the settlement by 100 persons on any portion of this land was sufficient to warrant the townsite application for the entire west ½ of said section. * * * * * If, however, on May 14, 1890, the date of the passage of the act above referred to, the town did not occupy each legal subdivision of the land claimed by it and a qualified homesteader made a valid settlement on such unoccupied subdivision prior to such occupation of the town, such a settler should be allowed to make an entry thereof. This, however, can only be determined when the town offers to make proof and payment, when such a settler may be heard and allowed to show his right in the premises. This would appear to be the position of Maples, or, in the event of his demise, of Bockfinger." (R. p. 30.)

The Secretary modified the holding of the Commissioner upon this legal proposition and rendered the following decision thereon:

"I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma townsite act of May 14, 1890, (26 Stat. 109), for legal subdivisions not actually occupied for municipal purposes at the date of the passage of the act above cited. Under said act 100 people or more may select 320 acres of land in Oklahoma Territory for a townsite, although they may not at the date of the selection or of the townsite act, use such smallest subdivisions thereof fo r municipal purposes. * * * * * After the settlers of West Guthrie had made their selection of the west half of said section for townsite purposes and taken possession thereof on April 22, at about 4 o'clock p. m., the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about 120 acres has not yet been settled upon as a place of residence will not prevent said portion from being included in the townsite entry. Towns are not built in a day, and from the very nature of things they should not be required to improve each of the smallest legal subdivisions in their selection before making entry, any more than a homestead claimant should be required to improve each 40 acres making up his homestead before making final entry." (R. pp. 31, 32.)

This decision is palpably erroneous. The portion of section 1 of the Act of May 14, 1890, hereinbefore quoted, specifically provides that, only "so much of the public lands situated in" this Territory "as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business * * * * * may be entered as townsites." The only authorities cited by Secretary Noble in support of the foregoing holding are his own decisions in the cases of Norman Townsite vs. Blakeney, 13 L. D. 399 and Walker vs. Lexington Townsite, Ibid 404 and

these are based almost entirely upon an opinion given July 2, 1856, by Attorney General Cushing, construing the act of May 23, 1844, (5 Stat. 657) entitled "An Act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances," which undoubtedly had reference more particularly to towns already in existence. In his opinion, however, Attorney General Cushing seems to have held that, under this act, a half section of land might be segregated for a townsite by a sufficient occupation, for actual business and residence purposes, of any one or more of the legal subdivision thereof, providing each of the other legal subdivisions were in use for townsite purposes at the date of entry. (7 Opinions Attorney General, 738.)

Said act provides, among other things, "That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a townsite, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; * * * * * That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of the land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity with the legal subdivisions of the public lands authorized by the act of the twenty-fourth April, one thousand eight hundred and twenty, and shall not in the whole exceed three hundred and twenty acres."

It is apparent that in an old established town many portions of the site may be used and, in that sense, occupied for municipal purposes, although not "covered by actual occupancy for purposes of trade

and business," as required by the act of May 14, 1890.

It is quite doubtful, however, whether, under the statute of 1844, Mr. Cushing's opinion did not too greatly expand the limitations contained in the act. He says: "In regard to agricultural occupation, the laws provide that, in certain cases and conditions, one person may pre-empt one hundred and sixty acres, and that in regard to municipal occupation a plurality of persons may, in certain cases and conditions pre-empt three hundred and twenty acres. In the latter contingency, there is no special privilege as to quantity, but a disability rather; for two persons together may pre-empt three hundred and twenty acres by agricultural occupation, and afterwards convert the land into a townsite, and four persons together might in the same way secure six hundred and forty acres, to be converted ultimately into the site of a town; while the same four persons, selecting land for a townsite, can take only three hundred and twenty acres. In both forms the parties enter at the minimum price of the public lands. (The chief advantage, which the pre-emptors for municipal purposes enjoy, is, that they have by statute a preference over agricultural pre-emption. In all other respects material to the present inquiry, we may assume, for the argument's sake at least, that the two classes, stand on a footing of equality, as respects either the conflicting interests of third persons, or the rights of the government.

Now the rights of an agricultural pre-emptor we understand. He is entitled, if he shall make settlement in person on the public lands and shall inhabit and improve the same, and shall erect a dwelling thereon, to enter, by legal subdivisions any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, (Act of 1841, s. 10.) and of two settlers on the same quarter section of land, the earlier one is to have the preference. (Sec. 11.)

Now, was it ever imagined that such claimant must personally inhabit every quarter-quarter section

of his claim? That he must have under cultivation every quarter quarter section? And that, if he failed to do this, any such quarter of his quarter section might be pre-empted by a later occupant?

Why should there be a different rule in regard to occupants for municipal pre-emption? The latter is, by the very tenor of the law, the preferred object. Why should those interested in it be subject to special disabilities of competing occupancy? I cannot conceive."

With due respect to the distinguished ability of the lawyer who was then Attorney General we think he failed to notice a clear distinction between the pre-emption and townsite acts as regards the necessity of occupancy. To authorize a party, otherwise qualified, to make a pre-emption entry of a quarter section of public land, it was only necessary that he make a settlement in person thereon and to inhabit and improve same or erect a dwelling thereon. Sec. 10, Act, May 4, 1841. (5 Stat. 455.) Such a claimant's entry was not limited in amount to "such land as is actually occupied by" him as was that of the townsite claimants by the act of 1844. In a decision rendered on June 26, 1858, (two years later than that of Mr. Cushing) the Secretary of the Interior made the proper distinction as to the limitation imposed by these acts. He says, "The title, as well as the words employed in the body of the act, clearly demonstrate that the same was intended to apply exclusively to actual and existing towns * * * * * Referring to the title of the act, 'for the relief of citizens of towns' etc., it may be easily determined that by the term 'occupants' is meant those who are settlers and residents, and that it only embraces the citizens thereof. * * * * The limitary words of the two statutes (1841 and 1844) are essentially different. The one limits the entry to such lands as are actually occupied by the town; the other gives the right of acquiring any number of acres not exceeding a quarter section. * * * * The mere selection by persons claiming to be the proprietors of a townsite, who do not reside thereon, of portions of the public lands, with

a view of making improvements at a future time, does not exempt such lands from the operation of the act of 4th of September, 1841. The act of 23rd May, 1844, authorizes the entry of any portion of the surveyed public lands which have been, or shall be, settled upon and occupied as a townsite, and, therefore, not subject to entry under the existing pre-emption laws. It also requires that the entry shall be made in trust for the several use and benefit of the occupants thereof, and such entry will embrace only such legal subdivisions as are actually occupied by the town." 1 Lester, 433. (435); see also Lechler vs. Chapin 12 Nev. 72 and cases cited.

In the case at bar, both the Commissioner and Secretary fall into grevious error by assuming that section 2389 (R. S. U. S.), which seems (or rather has been construed) to authorize the segregation and entry of 320 acres of public land as a townsite when any portion thereof is actually occupied for purposes of business and trade by as many as 100 people, has also been adopted as a part of the townsite laws of Oklahoma by the Acts of March 2, 1889, and May 14, 1890, *supra*. In the former Act sections 2387 and 2388 were specifically referred to and adopted and in the latter only section 2387. Where a less number than 100 townsite occupants apply to make entry of a portion of the public lands for such purposes, it has been the uniform ruling of the Secretary of the Interior that they are only entitled to enter the legal subdivisions thereof that are actually occupied for purposes of business and trade. Circular instructions approved November 5, 1886, and April 1, 1889, 5 L. D. 295; 8 L. D. 337. We confidently claim that, as section 2389 (R. S.) has never been made a part of the townsite laws of this Territory, the rule requiring actual occupancy of each legal subdivision of the land so entered is the same whether there are as many as 100 inhabitants thereof or a less number. Especially is this so under the Act of May 14, 1890. By what authority can the Secretary say that Congress did not mean to require actual oc-

cupancy, "for purposes of trade and business," of each legal subdivision entered, when the act expressly and unequivocally declares that such is required. If there are doubts as to the requirements of former statutes, in this regard, there certainly can be none concerning the meaning of this last enactment. Furthermore, as hereinbefore clearly shown, the selection of the townsite of West Guthrie was for the purpose of securing an entry additional to the prior townsite entry of Guthrie Proper, and, if this could legally be done when the first selected townsite contained the maximum amount which could then be entered, it is certain that only such legal subdivisions could be included in the additional entry as are actually occupied for townsite purposes. West Reno City vs. Snowden, 23 L. D. 74. Relative to the character of, and weight to be given, decisions of the Land Department, we fully concur with the following expressions of Chief Justice Horton in Emsley vs. Young, 24 Kas. 744, to-wit: "The decisions of the Land Department, having been so various, changeable and conflicting, relative to the interpretation of the land grants of Congress and the rights of pre-emption and homestead settlers thereunder, cannot greatly aid us in reaching the true construction of the statute; much less can we regard such decisions as conclusive, or the decision of the Secretary of the Interior in this case as *res adjusticata*."

That courts of equity have power to correct mistakes of the Secretary of the Interior in construing the law, see;

Johnson vs. Towsley, 14 Wal. 84.
Moore vs. Robins, 96, U. S. 534.
Quimby vs. Conlan, 104, U. S. 420.
Cornelius vs. Kessell, 128 U. S. 456.

We also insist that all of the department officers erred in holding, as a legal proposition, that the settlement and occupancy, prior to June 15, 1889, of the five acre tract on the north-east corner of the quarter section involved could, in any manner, aid the occupants of the north-west quarter of the same section in ac-

quiring title to any portion of the former quarter, it being undisputed that none of the settlers on said five acre tract ever appeared after June 15, 1889, to make any further claim because of their said former settlements thereon.

Again, the affidavits in support of Bockfinger's motion for a rehearing of said land case, show, beyond question, that no townsite settlement or occupation of any kind whatever was ever made upon any portion of the quarter section herein involved and that he (Bockfinger) had not been guilty of any *laches* in failing to produce these facts earlier (R. pp. 38 to 47.) The Secretary practically admits the force of this showing in his decision of October 13, 1892. He says: "The attorneys for Bockfinger have filed a motion for rehearing in this case on the ground of newly discovered Warden Brief, Galley Eleven ..... D O L evidence, supporting the same by affidavits of various parties. These affidavits are to the effect that no selection was made of the S. W. ¼ of Sec. 8 for townsite purposes prior to June 15, 1889. * * * * *

It may be admitted for the purpose of the present discussion that these affidavits set forth the facts actually existing, and still they afford no sufficient reason for a new hearing in view of the status we have determined Bockfinger occupies in this case. They do not controvert the conclusion that the land was actually settled by the townsite prior to Bockfinger's settlement, but on the other hand, tend strongly to support it, and hence do not aid his claim as a settler. And if, as heretofore concluded, he has secured no right as a contestant to enter said land, a new hearing which would establish the facts as set forth in these affidavits could not confer such a right on him. For these reasons the motion for a rehearing is hereby denied." (R. P. 37.)

The statement of the Secretary "that the land was actually settled by the townsite prior to Bockfinger's settlement" if intended to apply to the south-west quarter of section 8—being the quarter here in controversy

—is, as already seen, absolutely without support in the testimony or findings based thereon except the alleged settlement made on said five acre tract prior to June 15, 1889. An finding of fact which there is no evidence tending fairly to support is error of law. Pollock vs. Pollock. 71 N. Y. 137.

THIRD POINT.

The Secretary of the Interior committed error of law in holding, in his decision of October 13, 1892, that Bockfinger had no sufficient interest, either as contestant or settler, in the quarter section of land in question to give him any standing as an adverse claimant to the townsite occupants. The undisputed facts, which are also specifically found by the register and receiver and the Commissioner and approved by the Secretary, show that Bockfinger was (in effect) the second contestant of Feagins' entry and that he also charged Maples, the first contestant, with being disqualified to make homestead entry; also that his contest was filed long prior to the application to enter made by the townsite settlers; that on April 20, 1890, he established his residence upon said tract and continuously resided thereon up to the date of trial when he had the following improvements: a dwelling 14 by 16 feet in size, 2 acres broken and planted to crop and some fencing, he having expended on improvements about $250.00; (R. pp. 12, 20.) that both Maples, the first contestant, and Feagins, the entryman, acquiesced in departmental decision of December 16th, 1891, hence the same, after 30 days from the date they received notice thereof, became final as to them. Then, at the date of the Secretary's last decision, Bockfinger was the only remaining homestead claimant for this particular quarter section and was still an actual occupant thereof. Waiving, for purposes of this argument, all rights which he acquired by reason of his contest, still his rights as a settler were ample to entitle him to the land as against these townsite claimants.

One who occupies land covered by an entry is, as

against a subsequent occupant or occupants, preferred.

Geer vs. Farrington, 4 L. D. 410.

Smith vs. Place, 13 L. D. 214.

On cancellation of an entry the rights of a qualified settler residing on the land covered thereby at the date of cancellation attach *eo instanti*.

Pool vs. Malaughney, 11 L. D. 197.

Wiley vs. Raymond, 6 L. D. 246.

Stone vs. Cowles, 13 L. D. 192.

Blauvett vs. Masden, 18 L. D. 538.

McMichael vs. Murphy, et al., 20 L. D. 147.

Dawman vs. Moos, 19 L. D. 526.

The first settler, in point of time, upon a tract of public land subject to homestead entry, all other things being equal, will be given precedence upon the relinquishment or cancellation of the record entry.

Pool vs. Melaughney, *Supra*.

Spring vs. Reinbold, 25 L. D. 37.

Giles vs. Troop, Ibid, 448.

Feagins' entry was finally cancelled by departmental decision of December 16, 1891, (R. p. 30) and it is conceded that there were no townsite occupants of the quarter seciton in controversy at that time, and had been none since Julp 15, 1889, (R. pp. 17, 22.) while Bockfinger was still (and had been since April 20, 1890) an occupying claimant thereof under the homestead law. (R. pp. 8, 9.) Unquestionably then, under the rule laid down by the foregoing land decisions, his rights as such claimant attached *eo instanti* upon the cancellation of said entry and before any rights could have been acquired by a subsequent townsite occupation of said tract.

At the date of the Secretary's last decision, Bockfinger was the only remaining homestead claimant and, as such, had a vested equitable interest in and right to this land both as a contestant therefor and occupant thereof. In fact, the Secretary's decision as to Bockfinger's status and right as such contestant and occupant is so manifestly erroneous that we deem it useless to spend more time in the discussion thereof.

FOURTH POINT.

As the townsite settlers never appealed from the findings, decision and recommendation of the register and receiver of the local land office they are bound thereby and for this reason as well as for the others already assigned the Secretary erred in awarding the W. ½ and S. W. ¼ of said Section 8 to the townsite. (R. p. 7.)

Respectfully Submitted,

JAMES R. KEATON.
JOHN W. SHARTEL,
FRANK WELLS,
JOHN H. COTTERAL,
C. G. HORNOR,
FOR APPELLANT.

APPENDIX.

The United States of America.

To all to whom these presents shall come, Greeting:

Certificate No. 958.

Whereas, John Foster, W. S. Robertson and A. C. Schnell, Townsite Board No. 6 assigned to West Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the Townsite of West Guthrie in said County and Territory, according to their respective interests, have deposited in the General Land Office of the United States, a Certificate of the Register of the Land Office at Guthrie, Oklahoma Territory, whereby it appears that full payment has been made by the said John Foster, W. S. Robertson and A. C. Schnell, Trustees as aforesaid in trust as aforesaid, according to the provisions of the Act of Congress of the 24th of April, 1820 entitled "An Act

making further provision for the sale of the Public Lands" and the Acts supplemental thereto, including the Act of May 14, 1890, for the West half of Section eight in Township sixteen North of Range two West of Indian Meridian in Oklahoma Territory, excepting a reservation for park purposes described as follows: (Commencing at a stake forty feet West and forty feet South of the North-East corner of the South-west quarter of the aforesaid section eight; Thence South, eighty-nine degrees and forty-one minutes, West six hundred and eighty feet to a stake; Thence South one thousand and sixty feet to a stake; Thence North eighty-nine degrees and forty-one minutes East, two hundred and seventy feet and eight tenths to a stake; Thence South, thirty-seven degrees East, one hundred feet to a stake; Thence South, fifty-five degrees East, One hundred and seventy-five feet to a stake; Thence South eighty-eight degrees East, two hundred and four feet and five tenths to a stake; Thence North twelve hundred and fifty feet to the place of beginning, containing seventeen acres and nine tenths of an acre), said Townsite containing three hundred and two acres and one tenth of an acre, according to the Official Plat of the survey of the said Lands returned to the General Land Office by the Surveyor General which said Tract has been purchased by the said John Foster, W. S. Robertson and A. C. Schnell, Trustees as aforesaid, in trust as aforesaid.

Now, know Ye, That the United States of America in consideration of the premises and in conformity with the several Acts of Congress in such case made and provided, Have Given and Granted and by these presents Do Give and Grant unto the said John Foster, W. S. Robertson and A. C. Schnell Trustees, as aforesaid, in trust as aforesaid and to their successors, the said tract above described: To Have and To Hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said John Foster, W. S. Robertson and A. C. Schnell Trustees as aforesaid, in trust as aforesaid

and to their successors and assigns in trust as aforesaid.

In testimony whereof I, Benjamin Harrison President of the United States of America, have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington the sixteenth day of February in the year of our Lord, One Hundred eightcmfwyp cmfwyp cmfwpy cmfwy **One Thousand Eight Hundred and Ninety-three and** of the Independence of the United States the One Hundred and Seventeenth.

(SEAL.)

By the President, Benjamin Harrison.

By E. Macfarland, Asst. Secretary.

D. P. Roberts, Recorder of the General Land Office.

Rec. Miscl. Vol. II. Pages 71 and 72.

The Territory of Oklahoma, Logan County, S. S.

This instrument was filed for record on the 25th day of February A. D., 1893, at 11 o'clock A. M. and duly recorded.

G. H. DODSON,
Register of Deeds.

Territory of Oklahoma, County of Logan, ss.

I, J. S. Mabon, Register of Deeds in and for said County and Territory, do hereby certify that the within and foregoing instrument is a full, true and correct copy of such an instrument as it is recorded in Book 7 of Deeds, on pages 350 and 351, of the record in my office.

Witness my hand and official seal on this 28th day of January, 1903.

(SEAL.)

J. S. MABON,
Register of Deeds.

By H. A. HERWIG, Dept.